

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 12-md-02409-WGY

4  
5  
6 In Re: NEXIUM (ESOMEPRAZOLE)  
7 ANTITRUST LITIGATION

8  
9  
10 \*\*\*\*\*

11  
12 For Hearing Before:  
13 Judge William G. Young

14 Charge Conference

15 United States District Court  
16 District of Massachusetts (Boston)  
17 One Courthouse Way  
18 Boston, Massachusetts 02210  
19 Wednesday, October 15, 2014

20 \*\*\*\*\*

21 REPORTER: RICHARD H. ROMANOW, RPR  
22 Official Court Reporter  
23 United States District Court  
24 One Courthouse Way, Room 5510, Boston, MA 02210  
25 bulldog@richromanow.com

## A P P E A R A N C E S

THOMAS M. SOBOL, ESQ.

Hagens Berman Sobol Shapiro, LLP

55 Cambridge Parkway, Suite 301

Cambridge, MA 02142

Email: Tom@hbsslaw.com

and

STEVE D. SHADOWEN, ESQ.

Hilliard & Shadowen, LLC

39 West Main Street

Mechanicsburg, PA 17055

Email: Steve@hilliardshadowenlaw.com

For plaintiffs

LAURENCE A. SCHOEN, ESQ.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

One Financial Center.

Boston, MA 02111

Email: Laschoen@mintz.com

and

KAREN N. WALKER, ESQ.

Kirkland & Ellis, LLP

655 Fifteenth Street, N.W., Suite 1200

Washington, DC 20005

Email: Kwalker@kirkland.com

For Teva defendants

JOHN E. SCHMIDTLEIN, ESQ.

PAUL B. GAFFNEY, ESQ.

DANE H. BUTSWINKAS, ESQ.

Williams & Connolly, LLP

725 Twelfth Street, N.W.

Washington, DC 20005

Email: Jschmidtlein@wc.com

For AstraZenca defendants

1 (Continued.)

2

3 JAMES D. BALDRIDGE, ESQ.  
4 Venable, LLP  
5 575 7th Street, N.W.  
6 Washington, DC 20004  
7 Email: Jdbaldridge@venable.com  
8 For Ranbaxy defendants

7 KEVIN D. McDONALD, ESQ.  
8 Jones Day  
9 51 Louisiana Avenue, N.W.  
10 Washington, DC 20001  
11 Kdmcdonald@jonesday.com  
12 For the Dr. Reddy's defendants

11 BARRY REFSIN, ESQ.  
12 Hangley Aronchick Segal Pudlin & Schiller  
13 One Logan Square, 27th Floor  
14 Philadelphia, PA 19103  
15 Email: Brefsin@hangley.com  
16 For Rite Aid Corporation

14

15

16

17

18

19

20

21

22

23

24

25

1 P R O C E E D I N G S

2 (Begins, 10:00 a.m.)

3 THE CLERK: Now hearing MDL matter 12-02409, In re  
4 Nexium.

5 THE COURT: Well, good morning, counsel.

6 I want to start with the one document that was  
7 timely filed and that's the defendants' proposed jury  
8 verdict. I found that very helpful and, um, I have  
9 revised my proposed verdict slip accordingly.

10 There's a lot of verbiage in there. You drafted  
11 it as though it was some sort of foreclosure document.

12 (Laughter.)

13 THE COURT: Well, you may think that's humorous,  
14 but I'm not just going for any of that. Simplicity is  
15 the thing. But I have rethought my verdict slip and so  
16 the Clerk will pass out to you the current iteration. I  
17 also note in the papers not timely filed, which were  
18 received in the Clerk's office at 7:00 last night --  
19 where do you think I am at 7:00 last night? I was at a  
20 meeting. And though I got into the office before 8:00  
21 this morning, I've been teaching a class. So if you  
22 think I've gone over these papers, I have not. And  
23 candidly you people have let me down. You knew since  
24 last Friday that I had the time and I wanted to have  
25 this charge conference.

1 I have just looked at these proposed preliminary  
2 instructions. So while I'm willing to work with you,  
3 what you get is in large measure what you give me a  
4 chance to think through.

5 So let's go first to this jury verdict slip. I  
6 note and I'm gratified that there is a stipulation that  
7 the Section 2 claims under the Sherman Act are out.  
8 Now, when I look at this carefully I see that's only the  
9 direct purchaser class.

10 Is that true on the part of all the plaintiffs?

11 MR. SHADOWEN: Your Honor, Steve Shadowen on  
12 behalf of the end payers. We filed a similar document  
13 yesterday.

14 THE COURT: Thank you. So everybody's in on that.  
15 So -- yes?

16 MR. SCHMIDTLEIN: Actually the retailer opt-out  
17 plaintiffs have not filed.

18 THE COURT: Thank you.

19 MR. REFSIN: Your Honor, Barry Refsin, for Rite  
20 Aid and CVS. We still need to discuss that with our  
21 clients and we plan to do that shortly.

22 THE COURT: The trial begins Monday.

23 MR. REFSIN: We will have it by then. We expect  
24 to be consistent with the others.

25 THE COURT: Well, all right. In my mind, in the

1 light of that, if they go along, that obviates Question  
2 because market power doesn't have to be shown under  
3 the Clayton Act, correct?

4 MR. SCHMIDTLEIN: It's actually market power does  
5 have to be shown under a Section 1 claim, which is the  
6 claim that they're proceeding under.

7 THE COURT: I'm with you. So since Section 1 of  
8 the Sherman Act is in, I ought leave my market power  
9 question in?

10 MR. SCHMIDTLEIN: Correct. Monopoly power doesn't  
11 have to be in, but market power does have to be in.

12 THE COURT: Right

13 MR. SHADOWEN: Your Honor, we would take great  
14 exception to, um, the way this is --

15 THE COURT: Well, I'll give you --

16 MR. SHADOWEN: In terms of -- it's very clear  
17 First Circuit law that we do not need to show a relevant  
18 market. We do need to show market power, which is a  
19 much less showing than monopoly power under Section 2.

20 THE COURT: Well, you're -- I've got a changing  
21 target here. You might favor me with some law in a  
22 brief, because on Monday this document or some iteration  
23 of this document will be placed before the jury as part  
24 of my preliminary charge so they know who has to prove  
25 what. So, you know, I don't expect to work all weekend.

1 I'm here tomorrow. I'm here Friday. Monday we're  
2 picking the jury. I'd like --

3 Rather than just conclusions, you agree with that,  
4 right?

5 MR. SCHMIDTLEIN: I agree with --

6 THE COURT: That I shouldn't talk about -- the  
7 question should be revised, "Did AstraZeneca exercise  
8 market power?"

9 MR. SCHMIDTLEIN: Correct, your Honor.

10 THE COURT: And stop there?

11 MR. SCHMIDTLEIN: Um, we think it's "Exercise  
12 market power in a relevant market?"

13 THE COURT: Well, you disagree with what he just  
14 said?

15 MR. SCHMIDTLEIN: If that's the point he's trying  
16 to make, that he doesn't have to prove relevant market,  
17 yeah, we disagree with that.

18 MR. SHADOWEN: And we have First Circuit law that  
19 says we don't have to prove market power in a relevant  
20 market, it's just --

21 THE COURT: Now you see the weakness of this? We  
22 can sit here and we can make these conclusory statements  
23 and with all respect to you, they're meaningless. I've  
24 got to make prudential rulings based upon a record.  
25 You've not favored me with the tools. I expect you to

1 do so by the close of business on Friday. I'll work on  
2 the case, but I need to have the data in front of me.

3 All right. Let's -- recognizing that that's an  
4 issue, we'll go through the plaintiffs.

5 What other issues do the plaintiffs have with the  
6 jury verdict as now set up?

7 MR. SOBOL: If I may, your Honor?

8 THE COURT: Yes.

9 MR. SOBOL: Tom Sobol for the direct purchaser  
10 class.

11 First, um, it's not necessarily an issue, but I  
12 want to discuss a point to make that there's a clarity  
13 with respect to it. Number 1, the Court indicates that  
14 it would ask the jury whether the AstraZeneca-Teva  
15 patent litigation, the settlement of that litigation was  
16 a result -- would result in a substantial and  
17 unjustified payment by AstraZeneca to Teva? So two  
18 things with respect to that.

19 Of course the language -- I would assume that the  
20 Court plans on obviously, in its jury instructions, will  
21 define "substantial" in a way that's consistent with  
22 **Actavis** where the Supreme Court --

23 THE COURT: Well, what word did they use?

24 MR. SOBOL: They used the word "large," your  
25 Honor.



1 THE COURT: Well, all right. Then I like "large"  
2 better.

3 MR. SOBOL: Yes. And, second, I am assuming that  
4 the unjustified part of this, the Court has previously  
5 indicated at the last conference before -- um, in this  
6 case, the Court had indicated that the plaintiffs of  
7 course have a burden to be able to show that there was a  
8 large payment. If there are to be procompetitive  
9 justifications, that's the justification part here, then  
10 it's the defendants that need to come forward with what  
11 those supposed procompetitive justifications are.

12 THE COURT: That's how I understand it.

13 MR. SOBOL: Okay. So although the Court has -- I  
14 think it's fair to have this all in one question, I'm  
15 simply pointing out that the plaintiffs bear the burden  
16 on proving that there's a large payment and we believe  
17 that the instructions should indicate --

18 THE COURT: And unjustified.

19 MR. SOBOL: Well, um, I think not, your Honor,  
20 because if -- I believe under **Actavis** the Supreme  
21 Court's use of the word "unjustified" means whether  
22 there are justifications that are procompetitive.

23 THE COURT: Look, this is how this is going to  
24 play out. You've given me no -- I'll now amend Question  
25 1 so it says "in a large and unjustified payment by

1     AstraZeneca to Teva," and I've already ordered that  
2     that's the evidence I'm going to hear first. Once I've  
3     heard all that evidence, I am not bifurcating the trial  
4     we've already bifurcated.

5             MR. SOBOL: Sure.

6             THE COURT: Once you've put in all your evidence  
7     on that point, then you're to notify the Court. That's  
8     the pretrial order. I will expect, because they seem to  
9     be champing at the bit here, they will then move for a  
10    directed verdict. I will entertain argument on that  
11    motion and I will resolve it.

12            Now, if I resolve it against the plaintiffs, I  
13    will be satisfied that I have created a sufficient  
14    record and I assume I will be satisfied with my ruling  
15    that the case is teed up for appeal. If I deny their  
16    motion for a directed verdict at that juncture, the case  
17    will continue to the point where the plaintiffs rest  
18    entirely. I do agree with you that I think it is up to  
19    the defense to come up with the procompetitive  
20    justifications.

21            MR. SOBOL: Sure.

22            THE COURT: That's true. And so when you rest, if  
23    you, um, eluded directed verdict at that earlier stage  
24    in the trial, at least on that point and there would be  
25    others, causation and the like, you -- but on that point

1     you probably will elude a directed verdict at the close  
2     of all your evidence. Then we'll see what the defense  
3     comes up with as procompetitive justifications which,  
4     I've already said this, you not only will cross-examine,  
5     but you may then come up with, if it's genuine, genuine  
6     rebuttal. Now that's how I expect to manage the trial.  
7     But I'm going to leave the word "unjustified" in there.

8             MR. SOBOL: Very good, your Honor. I think we're  
9     exactly of the mind of how we're going to proceed.

10            THE COURT: All right.

11            MR. SOBOL: Number 2, with the Court's leave,  
12     we'll file a very brief brief on Friday regarding why  
13     there's no need for -- to show relevant antitrust market  
14     given the absence of those other claims.

15            THE COURT: Thank you. I'm eager.

16            MR. SOBOL: Okay.

17            I have no comment with respect to Number 3. Well,  
18     we'll do that in the instructions. No comment with  
19     respect to Number 4.

20            With respect to Number 5, there's only one small  
21     amendment that I would suggest, your Honor, and that's  
22     this, and it's important to have the background of it.  
23     So we want of course the jury verdict in the first phase  
24     of this trial to tell us enough information so that if  
25     the plaintiffs prevail, when we go to the damages phase

1 the delay of generics is sufficiently teed up so that  
2 they know what generics were delayed and when.

3 Now, we know of course, as you put in here, and  
4 it's correct, you know, "When did they first have come  
5 to the market?" That is correct. But the question then  
6 also is whether there would have been other generics  
7 that may have entered at that time or six months  
8 thereafter, in other words the AstraZeneca-authorized  
9 generic.

10 Now I would make this suggestion, your Honor, and  
11 then I have it in some very simple language. The  
12 damages differ significantly if it's only one generic  
13 that enters the market or more than one generic that  
14 enters the market because the price goes down  
15 significantly as additional generics enter the market.  
16 Therefore the short amendment to Question 5 would be,  
17 comma, "and would an authorized generic or other  
18 generics have launched thereafter and if so how many?"  
19 Or something like that, if you may.

20 THE COURT: Uh-huh.

21 MR. SOBOL: The notion here again is --

22 THE COURT: I think I understand.

23 MR. SOBOL: Okay.

24 THE COURT: All right.

25 What's the defense say about the proposed jury

1 instruction?

2 MR. SCHMIDTLEIN: The issue of how many authorized  
3 generics I guess that would have entered and what impact  
4 that would have had on the pricing and therefore the  
5 alleged damages, um, strikes me -- I think about --  
6 without having talked to my colleagues, it strikes me as  
7 that sounds like an issue that should be addressed in a  
8 subsequent phase of the case. I don't think addressing  
9 all of those issues in this phase of the case seems to  
10 be -- at least what I think we had contemplated was  
11 going to be part of this phase of the trial.

12 Obviously at this point we know that, um, based on  
13 your rulings, Ranbaxy and DRL would not come to the  
14 market. So the only generic that's really at issue,  
15 could it have come to the market before May of 2014, is  
16 Teva, and that's really what this trial is about. I  
17 don't know what other generics they think that they're  
18 going to be introducing evidence that would have come to  
19 the market.

20 THE COURT: Well, but if I accept your comment,  
21 then I would say, "And would an authorized generic have  
22 entered thereafter?" That would have been a Nexium  
23 authorized generic and they might well have done that.  
24 That makes perfect sense. And if the answer to that is  
25 "yes," that is going to affect the damage calculations

1 and I do want to get as much information from this jury  
2 as I can.

3 MR. SCHMIDTLEIN: I'm just trying to just think on  
4 my feet here. I mean the authorized generic issue  
5 obviously only relates to the Ranbaxy agreement in which  
6 the Court has ruled cannot form the basis for liability.

7 THE COURT: I don't see that. I mean "authorized  
8 generic" -- I understand an "authorized generic" to be  
9 an AstraZeneca-authorized generic.

10 Now, if the defense was to lose and they were to  
11 pick a date -- and of course the charge will make clear  
12 it has to be before the 2014 date. If they were to pick  
13 a date, what Mr. Sobol says makes some sense, "Would an  
14 authorized generic have entered thereafter?" "No."  
15 "Yes." If the answer is "yes," then we know that, and I  
16 know enough from the pretrial to know that that appears  
17 to have some effect on the damages.

18 MS. WALKER: Your Honor, if I could?

19 THE COURT: Of course.

20 MS. WALKER: Karen Walker for Teva.

21 THE COURT: Yes, Ms. Walker. I'm sorry to see  
22 that you are in a sling.

23 MS. WALKER: Hopefully we're on the mend.

24 THE COURT: I hope so.

25 MS. WALKER: You know, again, I haven't conferred,

1 but I would think that you could just leave this  
2 question as is because when your Honor divided the trial  
3 up the issues that were deferred for the second phase  
4 were fact of injury and damages. And so I think once we  
5 get to the point where there's a determination that  
6 there was a violation and that there would have been  
7 generic entry, the fact of injury, how many generics,  
8 who would they have been, and how would that have  
9 affected the pricing, would be a fact-of-injury question  
10 being in the second phase. So I think that --

11 THE COURT: I hear you, but I'm telling you that  
12 I'm disposed to amend -- remember these -- I could  
13 always take this back at the end of the trial and say,  
14 "Well, I think things differently now," but going in I  
15 think I am disposed to add, after the year, comma, "and  
16 would an authorized generic have entered thereafter?"

17 Now, with that taken care of, let's go to the  
18 charge, the proposed charge, and about all I can do for  
19 you, because, as I say again, you've let me down here,  
20 is to, um, give you a general reaction to your  
21 submissions. So we'll start with the plaintiffs.

22 The plaintiffs want me to give a detailed charge  
23 as to Hatch-Waxman and the patent laws. Actually I'm in  
24 favor of that. This may be too detailed or at a level  
25 of detail more than is necessary. But having read this,

1 I'm disposed to give it.

2 The defense, though not timely, has favored me  
3 with full jury instructions and though I haven't had a  
4 chance to go over them, I'm pleased to receive them, and  
5 I want to focus on Pages 8 --

6 MR. SCHOEN: Your Honor, just to clarify, we filed  
7 our proposed jury instructions yesterday morning, I  
8 believe, and it was the plaintiffs that filed theirs  
9 last night at 7:00 p.m.

10 THE COURT: Thank you.

11 MR. SCHOEN: Just to clear up that misimpression.

12 THE COURT: Yesterday morning is pretty late.

13 But where I'm going to start my work is on Pages  
14 8, 9, 10, and 11, the summary of the applicable law.  
15 Actually -- and again a very quick reading, though I  
16 might reorder things to match the jury verdict form, but  
17 the very quick reading looks good to me and I would  
18 propose to level -- I would propose to charge in roughly  
19 this fashion. I see the dispute about "relevant market"  
20 which is going to have to be resolved and I'll be alert  
21 to that. But these three pages look good to me.

22 Then I propose -- what I'm going to do now is go  
23 over this charge really as we sit here and just give you  
24 reactions to it. They're not rulings, um, but  
25 reactions. And then I'll stop and hear you with respect



1 to the charge.

2 I have a standard charge on duty of the jury and I  
3 will give it. The same for opening instructions, and  
4 I'll give that. Well, I'll identify the parties, but  
5 I'm going to be pretty vague as to the specifics.  
6 Actually this is helpful because I think I'm going to  
7 have to name all these parties who are named here, when  
8 we go to picking the jury, to see if anyone's a part of  
9 any of these operations. And so that's helpful to me  
10 and I'll use it for that.

11 "Everyone equal before the law." Though I will  
12 cover that in my own language. I'm not going to talk  
13 about limiting evidence, I'll do that at the appropriate  
14 time. Um, let's see.

15 Let's see. "Burden of proof." I'll give a charge  
16 on burden of proof. This charge is too complex. I talk  
17 about "fair preponderance of the evidence as more likely  
18 to be true than not true."

19 "Conduct of the jury." I will give my charge as  
20 to the conduct of the jury and it is adequate.

21 I will explain how trials work. I will explain  
22 objections in my way of explaining them. No need to  
23 define "direct" and "circumstantial evidence" at the  
24 beginning and I don't -- and I don't fault the defense  
25 because these could be the closing charges and I make --

1 I'm interested that the attorney-client privilege  
2 is here. My. My. My. You expect someone to take the  
3 attorney-client privilege here? We'll cover that when  
4 we do. I say no more.

5 "Credibility of the witnesses" will not be in the  
6 preliminary charge. Of course it will be in the post-  
7 trial charge.

8 "Notetaking" I will explain. This charge looks  
9 pretty good. It's the First Circuit charge.

10 "Jury questions." I have my way of doing that and  
11 I will do it my way. Oh, actually, I see, here you have  
12 -- Mr. Schoen, I give you credit for what you've done.  
13 These are all the preliminary instructions. So I guess  
14 I should stop now and I will.

15 That's how I propose to deal with it. So let me  
16 stop at this point and we'll -- I'm sorry I can't give  
17 you more guidance, I have not had time properly to  
18 prepare. But we'll leave with the plaintiff.

19 Comments on my comments?

20 MR. SOBOL: Yes, your Honor.

21 First, let me beg the Court's indulgence on  
22 something. When the Court did set up the hearing it was  
23 unclear to me whether or not the Court wanted  
24 submissions before this hearing, so we contacted the  
25 Clerk's office and, at least with the report that came

1 back to me, is that you were not expecting something.  
2 So that's still on me. But I just want you to know that  
3 it's not as if we were trying to completely disregard  
4 the notion that we wanted to try to prepare the Court  
5 more. So I apologize.

6 THE COURT: One would think that skilled advocates  
7 such as yourselves would understand in the main how  
8 judges work and that a charge conference especially  
9 would benefit from the value of having the charge in  
10 sufficient time before to review. Now, if defense got  
11 theirs in in the morning, I will be candid with you, I  
12 didn't take it home last night. I wished I had. But go  
13 ahead.

14 MR. SOBOL: Okay. So two things then.

15 First, regarding the general preliminary  
16 instructions, we have no comment. I mean the Court's  
17 indicated you're going to follow essentially your  
18 general practice. That's perfectly fine.

19 And then there's the question of whether and if so  
20 what the Court would instruct the jury at the outset of  
21 the case, before we go through things, as to what a  
22 "large and unjustified payment" is under **Actavis**, okay,  
23 and, um --

24 THE COURT: Well, I see that their proposal --  
25 let's -- we have something to work with, they touch on

1 that, and their proposal, um -- I could be wrong, but it  
2 looks to me like they have taken language straight out  
3 of **Actavis** and I would -- at least as I sit here now,  
4 we're talking about the two paragraphs on the bottom of  
5 Page 8 and I will tell you, um --

6 MR. SOBOL: If I may then, your Honor?

7 THE COURT: Yeah, let's focus on that.

8 MR. SOBOL: That's exactly where I was trying to  
9 go right to the core of it.

10 THE COURT: Right.

11 MR. SOBOL: So I think it's important for us to  
12 take a step back. We're working with the United States  
13 Supreme Court case and that in that case itself it  
14 defines what a "large and unjustified payment" is. The  
15 Court then talks about what is meant by "large" in that  
16 context, your Honor. What is meant by "large" in that  
17 context is a financial incentive from the brand to the  
18 generic that may influence the generic's settlement  
19 decision-making. And what we also note is that the  
20 Supreme Court has indicated that (a) if the payment does  
21 not exceed the brand's anticipated litigation costs,  
22 that might be acceptable, and (b) in some circumstances  
23 if the payment does not exceed the fair value of  
24 services or goods that are being provided, then the  
25 payment is not "large."

1           Now, beyond that, however, your Honor, the Supreme  
2       Court has indicated that if there is a payment above  
3       essentially the anticipated litigation costs of the  
4       brand, then that payment, that financial incentive may  
5       have an influence on the generic company's settlement  
6       decisions. And that's essentially -- and if we will,  
7       your Honor, we do have obviously a draft of jury  
8       instructions and you quote at length for about a page on  
9       **Actavis** --

10           THE COURT: Where is it?

11           MR. SOBOL: You don't have it yet. I would submit  
12       it later on today. And again, your Honor, that's why  
13       I've fallen on the sword at the outset. I have done  
14       that.

15           THE COURT: Well, fine, but saying it doesn't  
16       change it. Fine, you've fallen on the sword, and  
17       someday I will get your proposal, which I must view with  
18       skepticism as I view the defense, and the truth is the  
19       most you're getting out of this is I'll have to go back  
20       to the actual decision and take what I want to take out  
21       of it and I will.

22           MR. SOBOL: Sure. And again to be more specific  
23       though just to --

24           THE COURT: Go ahead.

25           MR. SOBOL: -- to do my best to educate you, your

1 Honor, and to be helpful at this hearing, if you go to  
2 the last paragraph on Page 8, there's something quite  
3 incorrect, as a matter of law, and something quite  
4 problematic for the First Circuit or for the Supreme  
5 Court. The defendants say "Whether a payment is large  
6 depends upon the circumstances of this case and may be  
7 judged in comparison to, among other things, the size of  
8 the relevant market." Well, there's nothing like that  
9 in **Actavis** at all. The relative market here is about \$3  
10 1/2 billion because it's theesomeprazole magnesium  
11 market. There is nothing in **Actavis** that says that the  
12 payment has to be large in the relative market, you  
13 know. Rather, what **Actavis** is saying is that the  
14 payment has to be of a size that might influence a small  
15 generic company to change its decision-making with  
16 respect to the settlement agreement. That's all. And  
17 frankly in the context of **Actavis**, any amount of money  
18 over and above the avoided litigation cost of the  
19 defendant may end up being the kind of external  
20 extrinsic influence that's going to change the generic's  
21 point of view.

22 THE COURT: Let me say this back to you at this  
23 stage in the litigation. I mean I do find this helpful,  
24 at least we're focused on things that are disputed here,  
25 but what I'm likely to do, in light of your objection,

1 is to pluck what I think the relevant language is out of  
2 **Actavis** directly and charge the jury on that language.  
3 If I have to interpret it a little bit for the jury, I  
4 will, but adhere as closely as I can to the reasoning of  
5 the **Actavis** opinion for starters.

6 Now, once we've had the whole trial, maybe I can  
7 revisit it. I simply said that on quick look this  
8 looked good to me. If you don't like it, I'll see what  
9 you give me, but I'll probably go back to **Actavis** and  
10 you'll hear what **Actavis** actually said.

11 MR. SOBOL: Yeah. And from our point of view,  
12 from the plaintiffs' point of view, that's the  
13 preferable way. And again not to harp on it again, your  
14 Honor, but to point out a similar kind of potential  
15 that's out there for you. Later on, in that same  
16 sentence, it says: "For the revenues that may have been  
17 earned in that market by the parties to the settlement."  
18 Well, the revenues that may be earned in the market by  
19 the parties to the settlement, AstraZeneca might earn  
20 billions of dollars, the generics might earn hundreds of  
21 millions of dollars, but in **Actavis** there's no mention  
22 whatsoever that the payment, the influential payoff from  
23 the brand to the generic has to have any relationship to  
24 either the size of the relative market or the revenues  
25 that those parties might earn in that market.

1 THE COURT: I hear the argument.

2 MR. SOBOL: Okay.

3 So -- and your Honor's already pointed out the  
4 "lacing of relative market" elsewhere in this, so I  
5 won't talk about that.

6 But that goes to the core and I think your  
7 solution, your Honor, which, um, is perfectly acceptable  
8 to the plaintiffs, is we simply parse the wording of  
9 **Actavis** to make it a little bit more understandable and  
10 better flowing for the jury and that's the way we  
11 proceed on this. Thank you.

12 THE COURT: Thank you.

13 The defense?

14 MR. SCHMIDTLEIN: Your Honor --

15 THE COURT: You don't have to go in order, but I  
16 saw Ms. Walker first.

17 MR. SCHMIDTLEIN: Oh, I'm sorry.

18 THE COURT: She's more noticeable because she has  
19 her sling.

20 MS. WALKER: I'll be very brief.

21 I do think Mr. Sobol did harp a little bit. I  
22 think that when you look at **Actavis** you will see that  
23 some of the things that they're saying are examples, the  
24 Supreme Court gave examples of traditional settlement  
25 considerations which could include attorneys fees, which



1     could include fair values for services, but I just want  
2     to put on the record that we disagree with the way he  
3     just described it that that was an exhaustive list of  
4     traditional settlement considerations that the Supreme  
5     Court said should be looked at.

6             THE COURT: Well, I understand that, but from my  
7     point of view, going in and trying to preserve the  
8     freedom of action both to counsel and the Court, it  
9     seems to me that justice is best served if I stick to  
10    their language, and if I need to expand on it or reflect  
11    on it, I can do so with the advantage of having presided  
12    over six weeks of trial.

13            Doesn't that make sense?

14            MS. WALKER: Well, I'm not sure I'm following you,  
15    but all I would say is where Mr. Sobol ended up, which  
16    is that we should say what **Actavis** says, and I was just  
17    trying to put on the record that we don't agree with his  
18    characterization of what **Actavis** said.

19            THE COURT: Oh, I'm skeptical of you all. I will  
20    go back and look at it.

21            (Laughter.)

22            THE COURT: Yes. Counsel?

23            MR. SCHMIDTLEIN: Yes, that's fine. We obviously  
24    have a different view about what "large and unjustified"  
25    means. We think **Actavis** says "large and unjustified" is

1 from -- it a proxy. If you see a large and unjustified  
2 payment, the Supreme Court says that might indicate the  
3 brand's view of the strength or weakness of its patents.  
4 Obviously you have to look at the size of the payment in  
5 relationship to what's at stake in the patent  
6 litigation. That's our point.

7 The Supreme Court also makes some language about  
8 the size of the payment in respect to the potential  
9 earnings of the generic company, in other words could  
10 the payment be larger than what the generic company  
11 could have expected to have made if they'd won the  
12 patent case? It's -- frankly it's a little bit  
13 confused, the Supreme Court speaks sort of on both sides  
14 of this issue. But we certainly disagree with  
15 Mr. Sobol's position that if it's larger than the saved  
16 attorneys fees, then it's per se unlawful, and I'm sure  
17 this is an issue that, you know, we'll be wrestling with  
18 as the case unfolds.

19 As I'm sure your Honor noticed, the instructions  
20 that we submitted yesterday morning before we got the  
21 stipulation that was submitted by the various plaintiffs  
22 yesterday afternoon includes instructions with respect  
23 to those other monopolization claims. I guess we urged  
24 the retailers to sort of cast their rope here quickly so  
25 we can know whether -- you know, whether these other

1       claims need to be included, and I guess just as a last  
2       technical footnote on the stipulations. They  
3       technically weren't stipulations because the defendants  
4       didn't sign them, these were unilaterally submitted by  
5       the plaintiffs, and the only thing that we would request  
6       is we want these claims -- if they want to jettison  
7       these claims, we're fine with that, but they need to be  
8       dismissed with prejudice.

9               THE COURT: Well, I would make clear that's the  
10       Court's understanding, if they're gone, they're gone,  
11       we're not coming back in some other iteration. And you  
12       will understand that I now take them, save as to these  
13       opt-out folks, they're gone.

14              Now -- all right.

15              MR. GAFFNEY: Your Honor, one other issue.

16              (Interruption by Court Reporter.)

17              THE COURT: Wait. Please identify yourself.

18              MR. GAFFNEY: Paul Gaffney for AstroZeneca. I  
19       share duties with my partner, Mr. Schmidtlein, on  
20       different parts of the case. I had focused on the  
21       patent issues.

22              I just make one observation on the preliminary  
23       instructions that the plaintiffs supplied last night,  
24       there's some language about patents.

25              THE COURT: Yes, there is.

1 MR. GAFFNEY: Now, we included an instruction --  
2 although it wasn't in the preliminary section, it's  
3 Instruction 19, the final instructions, on Page 19.

4 THE COURT: Thank you.

5 MR. GAFFNEY: Ours is based on the model  
6 instructions taken out of the ABA handbook because they  
7 have a model instruction about antitrust cases involving  
8 patents and it's noted on the basis of that. The  
9 instruction that we received last night from the  
10 plaintiffs is, um -- is, um, let's just say tilted a  
11 little bit toward the plaintiffs' view of patent law and  
12 I would urge your Honor to look closely at these. We  
13 think ours, based on the model rule, is more faithful  
14 and more evenhanded to what the jury ought to be told.  
15 But your Honor has tried plenty of patent cases and will  
16 be able to tell, from reading these, which one or  
17 which -- or exactly what instruction to issue.

18 I just wanted to make it clear that we had our own  
19 version.

20 THE COURT: No, I'm happy to know that you have  
21 your own version and I appreciate it.

22 All right. Now, um -- yes?

23 MR. BUTSWINKAS: Dean Butswinkas for AstroZeneca.  
24 I just had one question. You mentioned the jury slip.  
25 Will each juror have their own copy of that during the

1 opening?

2 THE COURT: Yes.

3 MR. BUTSWINKAS: I thank you.

4 THE COURT: Yes, and that's a very good question.  
5 So I propose that they be passed out at about the time  
6 we pass the notebooks out. They'll have it. I will  
7 give my precharge. I will direct the reporter to  
8 prepare one copy of the charge and the precharge will  
9 also be available to the jurors during the course of the  
10 trial.

11 MR. BUTSWINKAS: Thank you, your Honor.

12 THE COURT: Good question.

13 Now, this has been helpful. I don't mean to be  
14 overly critical and I expect to be prepared on Monday.

15 Now, you've done a bunch of other things too and  
16 of course that's fine. It's not my practice to  
17 entertain oral argument on motions in limine and I don't  
18 think I'm going to vary that practice here, but it might  
19 be helpful to go through these and at least give you my  
20 reactions to them.

21 These are not rulings. You must make your  
22 objections known during the course of the trial.

23 Most -- well, I'll say no more. But let me go through  
24 these and once I have, if anyone wants to say anything,  
25 I'll hear you on that. That last may be a mistake. But

1 again I'm trying to be helpful.

2 The government -- um, the government. The defense  
3 wants to exclude statements by a Ranbaxy executive that  
4 appeared somewhere in the paper or papers.

5 How are you going to get these in? They're  
6 admissions by Mr. Sing and because you've got your  
7 conspiracy claim -- I want to say a little bit more on  
8 that, but because you've got your conspiracy claim, I  
9 suppose they come in generally, but how do you get -- we  
10 don't receive newspaper reports. Have you got the press  
11 release of Ranbaxy? Well, how are you going to get it  
12 in?

13 MR. SOBOL: There are some internal records of  
14 Ranbaxy which, as a matter of business, they collect  
15 these reports and distribute them within Ranbaxy itself.  
16 And so we can show that Ranbaxy had the reports,  
17 circulated them internally, and so as a matter of course  
18 they have essentially both authenticated the fact that  
19 they existed and used it.

20 THE COURT: And those are the reports -- it's not  
21 the newspaper, it's going to be Ranbaxy documents?

22 MR. SOBOL: Right.

23 Now I should be clear, your Honor, if I may?  
24 Because there are about -- and I think everybody is  
25 getting all uptight, you know. Sometimes --

1 THE COURT: Don't you love it?

2 (Laughter.)

3 MR. SOBOL: Well, that's what it's all about,  
4 frankly.

5 THE COURT: It is.

6 MR. SOBOL: Some of the documents have attachments  
7 to e-mails that are circulating, other ones we got  
8 produced from Ranbaxy. These are the news reports that  
9 they produced to us. So we know they came from  
10 somewhere -- well, I should be clear about this. Some  
11 of them have an e-mail attachment to which the news  
12 report is attached. That's one category. A second  
13 category is the news report was found in the files of  
14 Ranbaxy and produced to us during the course of  
15 litigation, which I would also then suggest shows that  
16 it could be admissible because we've been told by  
17 Ranbaxy that the documents they produced to us have not  
18 been doctored, they came from obviously somewhere in its  
19 institution and are reflecting their memorializing -- or  
20 reflecting a reading of what it is that their CEO said.  
21 So that's the way we attempt to get it in.

22 Now, I don't know off hand, with all respect, your  
23 Honor, whether there's some other news report that we  
24 found elsewhere that we're trying to put it, that would  
25 raise a different issue that I'm not addressing. But if

1     it came internally from Mr. Ranbaxy and it's what their  
2     CEO said about this deal, we think it should come in.

3             MR. BUTSWINKAS: Judge, I still want the quotation  
4     from the newspaper and that's the most far-fetched  
5     definition of the business record exception I've ever  
6     heard that because the newspaper article was at the  
7     company someplace --

8             THE COURT: Well, I'm not able to rule on it  
9     because if they want it from the newspaper, they've got  
10    real problems. If they want admissions from Ranbaxy's  
11    own documents, then those are admissible as to Ranbaxy,  
12    and because of the rather interesting First Circuit  
13    approach to conspiracy, having charged conspiracy, they  
14    are putatively admissible against all of the defendants.  
15    That's the law.

16            MR. BUTSWINKAS: Your Honor, I think at a minimum  
17    there is a very significant foundation question here  
18    both on the foundation proving that the statement quoted  
19    in the newspaper was said, for which there is no record  
20    made.

21            THE COURT: I will tell you -- again this is the  
22    problem with motions in limine. If we were doing this  
23    at a trial, I would see a document. It would go along  
24    in a linear fashion. So all I can say is I'm hostile to  
25    newspaper reports until they become ancient documents.



1     These are not ancient documents. So newspaper reports,  
2     by and large, are out. When he -- when Mr. Sobol  
3     stands, he started talking about internal Ranbaxy  
4     records.

5             Now, I do want to say something on conspiracy, but  
6     let me hear you further.

7             MR. BUTSWINKAS: The only thing I would say is I  
8     hear what you're saying on those foundation issues and I  
9     do think it's better for you to hear them in the context  
10    of the trial.

11            THE COURT: So would I.

12            MR. BUTSWINKAS: And therefore what I would  
13    request is they not be able to talk about this newspaper  
14    article in their opening until you hear that foundation.

15            THE COURT: Oh, well, they run the -- I'm not  
16    making orders as to the opening unless I feel I have to.  
17    Everybody runs whatever risks they want to run in the  
18    opening. I'll cut that off, if necessary, at an  
19    appropriate time.

20            Now, a word about conspiracy. The law of  
21    conspiracy in the First Circuit is governed by some very  
22    important decision in the criminal context, but the  
23    First Circuit approaches the conspiracy doctrine not in  
24    the common law fashion, but in a reverse of the common  
25    law, and the First Circuit law is, under *United States*

1     **vs. Petrozziello**, that when a party alleges conspiracy,  
2     the judge is to take those allegations at face value and  
3     act as though the conspiracy allegations are made out,  
4     and, um, the judge first exercises his duty under  
5     801(d)(2)(E) at the close of the plaintiffs' case and  
6     then again at the close of all the evidence, under --  
7     I'm blanking on the case, but there's another case. And  
8     I take that -- with conspiracy there is a preliminary  
9     finding of fact that the judge must make and the  
10    preliminary finding of fact, though it is for the jury  
11    ultimately, is whether the judge as factfinder comes to  
12    conclude that the admission of the party is actually  
13    made during and in furtherance of a conspiracy with the  
14    other defendant or defendants.

15           If the dust settles and I were to conclude as a  
16    matter of fact that the conspiracy is not made out, then  
17    I strike out as against each party the conspiratorial  
18    admissions of another party and I look to see whether  
19    there's sufficient independent evidence that the jury  
20    could, um, find conspiracy.

21           Now, that's all well and good and indeed in most  
22    criminal cases the First Circuit approach works very  
23    well and has little interference from the judge. The  
24    problem occurs when the judge doesn't make that finding  
25    and yet the jury has heard this evidence. And in those

1       circumstances, and I would hate for this to occur, and  
2       of course plaintiffs trade on that because judges are so  
3       hesitant to grant mistrials, but you can't unring the  
4       bell. If the plaintiffs put in prejudicial  
5       conspiratorial evidence and I have to strike that out,  
6       be very clear that I will take very serious the motion  
7       for a mistrial and we get nowhere.

8               When you're operating under 801(d)(2)(E), the  
9       judge has a fact-finding role and I take mine very  
10      seriously. Just be aware of it. That's all.

11             Now, just going on through this, the defendants  
12      make this huge motion for various topics. I'll give you  
13      my reaction to the thing. These are not rulings. I'm  
14      not troubled by them saying -- and I'll just go through  
15      it, this is Docket Number 1044 and I'm just going on the  
16      titles.

17             Pay for delay agreements. Delay agreements.  
18      Reverse payment agreements. I'm not troubled with any  
19      of that. I think I get troubled with "bribes." I don't  
20      suggest they'd do that. Reference to the plaintiffs as  
21      "victims". I'm not troubled by that. Obviously appeals  
22      to the jurors' self-interest as consumers or taxpayers,  
23      that's forbidden.

24             Financial status of the parties? We may  
25      necessarily have to get into that. Size, location, or

1 specialization of defense counsel. That's out. We're  
2 not interested in defense -- I'm interested in it and I  
3 would honor and respect you all, but the jury is not  
4 interested in it and they will not become interested in  
5 it.

6 Foreign companies is not going to be emphasized  
7 and I will say everyone's equal before the law. Failure  
8 of defendants' witnesses to appear at trial. No ruling  
9 on that. We'll see how that all plays out. That the  
10 defendants acted unethically or immorally? Well, if you  
11 violate the antitrust laws of the United States and you  
12 do it willfully and intentionally, it would depend on  
13 truth.

14 Irrelevant matters? Well, making motions that I  
15 would exclude irrelevant matters is not terribly helpful  
16 because I will exclude irrelevant matters. "References  
17 to big pharma or similar terms"? I don't see what role  
18 that plays here, but we'll see. "Prior unrelated  
19 litigation and regulatory proceedings?" Well, if it's  
20 unrelated, it's unrelated.

21 The confidential or highly confidential stamps, if  
22 they appear on any of the documents that get in  
23 evidence, I will tell the jury to disregard those and  
24 I'll soft pedal that saying that was just part of the,  
25 um, business of getting ready for trial.

1           Then they've got one on here, "irrelevant  
2 documents involving discovery or privilege," if it's  
3 irrelevant, it's excluded. The rule tells me that.  
4 "Media coverage of the defendants or other." I'm not  
5 interested in media coverage. I'm not interested in  
6 trial publicity. I don't think I need to make rulings  
7 on any of that. Competent counsel would stay away from  
8 all of that, um, with the excisions that I have  
9 mentioned.

10           Now, let's see here. I see the stipulation  
11 regarding Section 2 claims. I see a large number of  
12 stipulated facts. Let's stop a moment on that.

13           How do you propose to get this data before the  
14 jury, would you all agree that it might become an  
15 exhibit in the case?

16           MR. SOBOL: That's the plaintiffs' proposal, your  
17 Honor.

18           THE COURT: The defense?

19           MR. SOBOL: That it be published in some manner.

20           THE COURT: Yeah.

21           MR. SCHMIDTLEIN: No objection to that.

22           THE COURT: Fine. So you people are working, I  
23 know, on your exhibit list, so we'll agree that the  
24 stipulated facts, which are Document 1049, are admitted  
25 in evidence and will be treated as an exhibit and the

1 parties can, um, number it.

2 Let's see here. Now the plaintiffs, they, um,  
3 have their own -- they don't want the following.

4 "Exclude the evidence about whether direct  
5 purchase plaintiff passed on any overcharge or lost  
6 profits." I don't think either of those is, um,  
7 appropriate for this case. "Failure to mitigate  
8 damages," that's not in this phase of the case.  
9 "Reference to treble damages, attorneys fees, and  
10 costs." I would think that would be out. "Direct  
11 purchaser plaintiff financial condition"? I don't see  
12 how that would be relevant. Those aren't rulings, but  
13 that's my reaction.

14 Now, let's see here. Oh, this business of lack of  
15 standing. I would -- I thought that I had taken care of  
16 that in my --

17 Is that going to be a matter of dispute in this  
18 trial or is this just an excess of caution? Are you  
19 going to attack the standing of the named plaintiffs  
20 based on the assignments?

21 MR. SCHMIDTLEIN: I don't think we are, your  
22 Honor.

23 THE COURT: Yeah, so no need to rule on that.

24 MR. REFSIN: Your Honor, one issue on that?

25 THE COURT: Yeah.

1 MR. REFSIN: That also applies to the opt-out  
2 plaintiffs. We're going to file a separate motion for  
3 the opt-out plaintiffs. We have agreement that that  
4 applies to all the plaintiffs in the --

5 THE COURT: I'm going to treat the plaintiffs as  
6 plaintiffs and explain to the jury -- you know, "We've  
7 got all sorts of plaintiffs here, we've got wholesalers,  
8 we've got retailers, we've got lawyers who represent the  
9 actual consumers. You're not going to be concerned with  
10 that. We're going to be concerned with" -- and then  
11 I'll go on to the issues of the antitrust laws. And as  
12 I've already explained in the pretrial conference, I'm  
13 treating the whole raft of plaintiffs as an entity, one  
14 lawyer for each witness and the like. So I think you  
15 may understand that they're not going to challenge your  
16 standing, they'll attack your claim. Thank you.

17 MR. REFSIN: Thank you.

18 THE COURT: All right. I don't know that I need  
19 an omnibus brief in lieu of multiple briefs, but that  
20 motion is allowed.

21 Oh, now, here's another, the plaintiffs have  
22 another. "Adverse impact that damages will have on the  
23 defendants or the drug industry." I don't think we're  
24 going to get in any of that. "Evidence regarding past  
25 or present litigation involving the plaintiffs." Well,

1 I'm allowed to exclude present litigation involving the  
2 plaintiffs which is relevant, or their counsel, but I'm  
3 only going to admit relevant evidence and I'm going to  
4 be strict on it.

5 "AstraZeneca from disparaging generic drugs or  
6 touting brand drugs." Well, that's preliminary, I'm not  
7 excluding that. Maybe those will -- people do  
8 believe -- at least the public believes that there is  
9 sometimes a difference due to manufacturing quality  
10 control, whether that's true or not. If I look at the  
11 substance here, I -- um, "denigrating generic drugs such  
12 as copycat or need-to drugs," well, I don't know as I'm  
13 going to forbid it. Nor am I going to forbid  
14 AstraZeneca from calling itself an "innovator," I mean  
15 it had patents, that's what's at issue here. I've  
16 already ruled that the payment need not be in cash.

17 "Exclude evidence or opinions that authorize  
18 generic, so are anticompetitive." I think that's a  
19 little broad here. I would -- I don't see how  
20 authorized generics could be anticompetitive. But if  
21 you've got some witness who wants to say that, we'll see  
22 what the basis of that is.

23 "To exclude the live testimony of defendants'  
24 witnesses who are unavailable to testify in the  
25 plaintiffs' case in chief." Oh, that make some sense.



1 I mean we're not going to play cat and mouse here with  
2 this --

3 You're not going to call anyone that's not going  
4 to be available to testify if they call them as an  
5 adverse witness, are you, the defense?

6 MS. WALKER: Your Honor, I can speak for Teva. I  
7 believe they've asked for two current employees in their  
8 case in chief and I agreed and stipulated to bring them  
9 subject to the stipulation that I could bring them back  
10 if need be, et cetera.

11 MR. McDONALD: Your Honor, Kevin McDonald on  
12 behalf of Dr. Reddy's. You have said in the past that  
13 we could -- that we had the option of bringing our  
14 people one time to the trial who are -- who don't live  
15 in or near Boston and that is our current plan. In  
16 those cases they have depositions in the case of, I  
17 believe, two of them --

18 THE COURT: No, that's not how we're going to do  
19 it. If they want them, you bring them, and they'll come  
20 one time, I'll let you examine and I'll explain it to  
21 the jury. I won't prejudice anyone. But if they want  
22 them, you bring them, if you're going to use them.

23 MR. BALDRIDGE: Your Honor?

24 THE COURT: Yes.

25 (Interruption by Court Reporter.)

1 THE COURT: Would you identify yourself.

2 MR. BALDRIDGE: Yes, Doug Baldridge on behalf of  
3 Ranbaxy.

4 We had two witnesses that are no longer employees.  
5 The intention, based on prior rulings, was always to  
6 bring them in our case. They would use the deposition  
7 transcript in their case.

8 THE COURT: Well, that's not how I'm doing it. If  
9 you're going to bring them, um, same as for Dr. Reddy's,  
10 if you want to use them, you bring them, and I'll allow  
11 your examination, so they only have to come once.  
12 Unless they're really playing ball with you, then they  
13 can come back. Whatever you think is most effective.

14 MR. BALDRIDGE: Your instruction is to bring them  
15 in their case?

16 THE COURT: Yeah, that's my instruction.

17 MR. BALDRIDGE: Yes, your Honor.

18 THE COURT: Okay, let's see.

19 "Motion to exclude reference that a New Jersey  
20 District Court in any way approved the patent litigation  
21 settlement." Well, obviously the judge did approve it,  
22 he entered a consent judgment. This gets into the  
23 whole, um, Judge Raycroft in the Second Circuit, back  
24 and forth. I think if we get into that, you may on your  
25 peril. I'll express my views. I've already said

1     there's no **Penoyer** -- if that's the appropriate case,  
2     you get no defense based on that. I can take care of  
3     that.

4             "Preclude assertion of any risk aversion".

5     (Pause.) Well, again it's too preliminary to rule on  
6     this. If AstraZeneca's people get up and explain why  
7     they entered into this, if part of that was aversion to  
8     litigation risk, if that's what actually happened, I'm  
9     going to let them say it. I'm not going to let experts  
10    say it.

11            I want a foundation for these things and I want a  
12    foundation based on evidence. That's where the defense,  
13    if they run into trouble, that's where they're going to  
14    run into trouble. They're going to have to actually set  
15    out what they actually did, then we'll hear from experts  
16    tell us why that's swell.

17            (Pause.)

18            THE COURT: I don't -- the FTC investigation? Why  
19    is that -- I would -- I don't imagine we're going to get  
20    into that, are we, the FTC investigation of these  
21    settlements? The defense?

22            MR. BUTSWINKAS: Your Honor, not the substance of  
23    the investigation, but the fact of the settlement  
24    agreement being submitted to the FTC as part of the  
25    settlement agreement itself, and that certainly will

1       come into evidence.

2               THE COURT:   And I would -- but not what they did  
3       or didn't do about it, just that it was submitted?

4               MR. BUTSWINKAS:   That's correct.

5               THE COURT:   Yeah, I would think they could have  
6       that.

7               "Related supposed good character."   Well, there's  
8       rules on good character or reputation and I'll follow  
9       the rules.

10              Let's see.   This one about what AstraZeneca uses  
11      its profits for doesn't seem to be part of this case, so  
12      I would imagine that that would be out.

13              The -- all right.   And I think that's all I have  
14      before me.   Except that the plaintiffs now --

15              Do I have any motion to quash the -- in this  
16      court, to quash the subpoena of Lisa Jose Fails and JR  
17      Despot?   Do I have a motion to quash that?

18              MR. SOBOL:   You either do have them, your Honor,  
19      or its on its way from the District of Columbia.

20              THE COURT:   That's what it says.   And  
21      interestingly in this related litigation, my colleague I  
22      think in the Eastern District of Pennsylvania, while she  
23      quashed a bunch of them, she didn't quash one, and that  
24      one is situated like these two folks.

25              MR. SOBOL:   That's correct, your Honor.   It was

1 Judge Diamond in the Eastern District of Pennsylvania.

2 THE COURT: All right. So now Judge Chukan sends  
3 this to me. So why don't I wait till I get it and then  
4 we'll see.

5 MR. SOBOL: That's fine, your Honor. I have filed  
6 a motion to be able to be heard, because I know you  
7 normally wouldn't be heard on something like this.

8 THE COURT: Yeah, I know you've filed it, but I  
9 think I have a developed record on this. We'll see.  
10 Actually I now have jurisprudence from my colleagues,  
11 which I find very helpful.

12 Is there anything else we should do this morning?

13 MR. SOBOL: If I may, your Honor?

14 THE COURT: Go ahead.

15 MR. SOBOL: Thank you. I'm getting over getting  
16 shot down on that. I was really looking forward to  
17 talking about MDLs and subpoena powers and that kind of  
18 thing, but, so --

19 THE COURT: I know you are, Mr. Sobol.

20 Is there anything else other than that?

21 MR. SOBOL: Well, two issues, your Honor.

22 One of the witnesses, um -- well, I'm assuming  
23 that although we have a phased trial, if there is a  
24 witness who takes the stand is a live witness, one of  
25 the defendant's former officers or a current employee,

1 for example, the General Counsel of AstraZeneca will be  
2 one of the testifying witnesses, the notion is to go  
3 through all of the testimony about that witness even  
4 though some of that testimony is going to cover issues  
5 that are not the Teva deal, because I can't imagine that  
6 what we would want to do is have a live witness come to  
7 talk about some part of the Teva deal, try to give some  
8 context for that Teva deal, have that witness get off  
9 the stand and then come back the next week and talk  
10 about the Ranbaxy deal.

11 THE COURT: Yeah, I'm generally okay with that.

12 MR. SOBOL: Okay.

13 THE COURT: But I want to know when I've heard  
14 everything about the Teva deal. You see, to me that's  
15 the -- it's much less important to the jury, and I want  
16 you to marshal your best case, than it is to me. So  
17 you've got to front-load everything about the large and  
18 unexplained payment because, as I feel my way in this  
19 new area, I adhere to my idea that we'll give the  
20 defense their chance to attack that part of the case.

21 MR. SOBOL: So let me say two things about that,  
22 your Honor. We are doing absolutely everything we  
23 possibly can to front-load the Teva reverse payment  
24 deal, okay? The issue that comes up, as I've just  
25 flagged, is that to do the Teva deal we have to call

1     some witnesses from, for instance, AstraZeneca. Well,  
2     those witnesses from AstraZeneca address the Teva deal,  
3     but also some other aspects of the case. So I'm  
4     assuming I don't just try to carve up their testimony --

5             THE COURT: That's my assumption as well.

6             MR. SOBOL: Fair enough. And that's our working  
7     assumption as well, too.

8             Is there something else? Oh, yeah.

9             I'm also assuming, your Honor, that as to our  
10    experts, however, we will carve up our expert testimony.  
11    In other words, for instance if Dr. McGuire is going to  
12    testify about some Teva issues and some other Ranbaxy  
13    issues, that kind of thing, because he's an expert, he's  
14    my expert, I carve it up and I only put him on the stand  
15    for the first time on the Teva thing, we have the  
16    motions --

17            THE COURT: So long as you alert me to the fact  
18    you're going to recall him, that makes sense to me.

19            MR. SOBOL: And that's an effort to be faithful to  
20    your desired --

21            THE COURT: Yes, and I appreciate it.

22            MR. SOBOL: Okay. And then, um -- yeah, just two  
23    other points, your Honor.

24            The next is, um, there are some documents that we  
25    would like to be able to publish to the jury in an

1 appropriate and professional way, but it's not through a  
2 witness. I mean there's just sort of -- there are some  
3 statements and some documents, that kind of thing, that  
4 at times end up being voluminous. I'll give you a  
5 particular example.

6 In order to set up the context of the Teva reverse  
7 payment we need to educate the jury that some things  
8 happened in the lawsuit between AstraZeneca and Teva  
9 that led up to the settlement. So there are a dozen or  
10 so pleadings of things that happened in that underlying  
11 case that we just want the jury to be able to understand  
12 about before we get to the settlement.

13 Now, early on, I thought, well, if I need to have  
14 a witness, I would have to drag one of the lawyers in  
15 from that case and have them just sort of tell us what  
16 happened in the case, but that, it seemed to me, to be  
17 frankly a distraction and unnecessary. What we intend  
18 to do -- and the reason I'm bringing this up is we're  
19 trying to tell the defendants what we plan to do day to  
20 day and it matters in terms of us trying to, in good  
21 faith, tell them this. We want to be able to publish  
22 the documents. And what we would probably do, if  
23 something is -- we're going to give the defendants the  
24 documents, we're going to highlight for them the  
25 passages that will be read to the jury, they can object



1 or not, we'll come to you beforehand about whether or  
2 not we're carving it up the wrong way, and then we would  
3 have somebody simply read those to the jury.

4 THE COURT: These are exhibits?

5 MR. SOBOL: Of course. Nothing will be read to  
6 the jury unless it's an exhibit.

7 THE COURT: How long is this going to take?

8 MR. SOBOL: I think we are estimating, for each of  
9 the two segments, to be no more than 45 minutes each.

10 THE COURT: That's going to be deadly dull, but  
11 that may be even shorter though than calling a witness.

12 MR. SOBOL: Right.

13 THE COURT: It's not something on which I can  
14 rule. It's deadly dull.

15 MR. SOBOL: Well -- right. I can't imagine that,  
16 in the course of a patent infringement case, your Honor,  
17 being deadly dull to the jury.

18 (Laughter.)

19 MR. SOBOL: But we will try to cut it down to be  
20 sure. Okay. I hear what the Court said. Yes.

21 THE COURT: You know it, it's a document, I would  
22 say, "Well, they'll have it in the jury room," but your  
23 repost to that is that they need to hear it now because  
24 live witnesses are going to say, "In light of that, we  
25 did this and the like."

1 MR. SOBOL: Right.

2 THE COURT: Thank you. It aids my understanding  
3 and we'll have to see how it goes.

4 MR. SOBOL: Fair enough.

5 The final comment, your Honor, is it would be  
6 greatly helpful to us, both in terms of preparation and  
7 trying to provide to the Court and to the defendants our  
8 good faith order of the witnesses, if the defendants can  
9 tell us who the witnesses are that they plan calling in  
10 their case so we can make sure that we're not putting  
11 together deposition snippets and all the rest of that in  
12 our case in chief. So if there's some appropriate time,  
13 maybe at the end of business tomorrow or on sometime on  
14 Friday, that would be very helpful. And so --

15 THE COURT: I'm hesitant to order it, but it makes  
16 sense.

17 Aren't you people going to tell them who you're  
18 going to call?

19 MR. BUTSWINKAS: Judge, we'll let them know by  
20 Friday.

21 THE COURT: That's helpful.

22 MR. SOBOL: Thank you.

23 THE COURT: All right.

24 Defense, anything we should do this morning?

25 MR. BUTSWINKAS: Yes, Judge, I just have one

1 question.

2 THE COURT: Yes. You used the words earlier  
3 "genuine rebuttal," and I just want to get a feel for  
4 that because my genuine understanding of rebuttal is  
5 evidence that was to respond to something that was  
6 essentially unanticipated or surprising that happened in  
7 the defense case.

8 THE COURT: Yes, but that's not this. But your  
9 question is a good one.

10 They have to come up with enough to convince me --  
11 because we're never going to get through the whole case,  
12 enough to convince me that a reasonable jury could find  
13 a large and, the language is, "unjustified payment."  
14 All right? When they're done with everything on the  
15 Teva deal, you're going to attack that and we'll see  
16 whatever I do. But that's a directed verdict standard.  
17 That I take every bit of it in their favor and make my  
18 decision.

19 If they get by that, they get -- they put on the  
20 rest of their case and the whole case is attacked on a  
21 directed verdict at the end of their presentation. If  
22 they get by that, then you will -- you have cross-  
23 examined their witnesses, but also you come up with your  
24 affirmative evidence of, um, all the stuff that you want  
25 to come up with, but also you come up with all your

1 procompetitive reasons for the settlement. I have to  
2 have enough that this -- that I think a jury could find  
3 it was unjustified, but you're not going to sit still  
4 for that, you're going to come up with all your  
5 procompetitive reasons, and I'm going to let you do  
6 that, that would be a significant part of the defense  
7 case.

8 They'll cross-examine. Even though we know that's  
9 an issue, I'm going to let them get back on the stand  
10 and say that these procompetitive -- with affirmative  
11 evidence, not just cross-examination, these  
12 procompetitive justifications are either a sham or don't  
13 -- have no effect or the like. That's what I mean by  
14 rebuttal in this part of the case.

15 MR. BUTSWINKAS: And my question is, just with  
16 respect to rebuttal evidence, plaintiffs' rebuttal  
17 evidence in general, it appears that the plaintiffs have  
18 taken a lot of their affirmative experts, who are  
19 identified, and they shifted them to rebuttal experts  
20 even though they're to respond to issues that have been  
21 long in the case.

22 THE COURT: Well, this is very appropriate to  
23 raise. Your view of rebuttal is accurate save for these  
24 procompetitive, um, justifications. We're not really  
25 going to hear the procompetitive justifications until

1 your case. I'm going to let them attack your  
2 procompetitive justifications after you are through.

3 Now, other things like causation, for example --  
4 well, causation, bringing the generic to market, I'm not  
5 going to have another whole plaintiffs' case downstream  
6 after you've rested.

7 Am I answering your question?

8 MR. BUTSWINKAS: Yes, understood, your Honor.  
9 Thank you very much.

10 THE COURT: All right.

11 You understand where I'm coming from?

12 MR. SOBOL: I understand you completely, your  
13 Honor. I'm trying to identify for you what was really  
14 behind that colloquy.

15 The plaintiffs don't think that we need to prove  
16 in our case in chief a patent case as well. This is not  
17 going to be a patent trial. For us to be able to prove  
18 that there was a large and unjustified payment, that  
19 there was causation as associated to that, when as and  
20 if it delayed generics, in our view we don't have to put  
21 on a patent case.

22 The defendants have lots of patent witnesses that  
23 they may or may not put on, we don't know, in their  
24 defense. Now, at least in some respects we try to be  
25 careful, lawyers, although we weren't very good this

1 week. We have lots of experts that are patent experts,  
2 and about chemistry and about clinical issues, more or  
3 less all of that, we don't think is relevant in our  
4 case. If the defendants during their case, for whatever  
5 reasons, appropriate or inappropriate or whatever, it  
6 doesn't really matter, decide to raise as procompetitive  
7 justifications or through some other --

8 THE COURT: Let me interrupt you only to say that  
9 I'm listening to you both and I'm not troubled in the  
10 least.

11 MR. SOBOL: Sure.

12 THE COURT: I think I've appropriately managed the  
13 case because if when you have -- forget rebuttal, if  
14 when you have rested, and I'm expressing no opinion on  
15 this, that I somehow get it into my mind that you should  
16 have proved a patent case, you've run that risk, I  
17 direct, you're done, and it goes up on appeal.

18 MR. SOBOL: Right.

19 THE COURT: Now, if you get by that and they put  
20 on their evidence and we're hearing for the first time  
21 what are in effect essentially patent witnesses, we're  
22 hearing them for the first time, I'll let you rebut  
23 them. The fact that they're in the case or not is a  
24 test of what is the prima facie case here. That's your  
25 risk. I think something's in the prima facie case, you

1 don't, I get no evidence on it, and the case is lost.  
2 New evidence can be rebutted under the standard rule as  
3 counsel framed it -- framed it appropriately.

4 MR. SOBOL: Uh-huh.

5 THE COURT: Procompetitive justification can be  
6 rebutted by wholly new evidence that says it's not  
7 procompetitive justification.

8 MR. SOBOL: Thank you, your Honor.

9 THE COURT: All right.

10 Well, this has been more helpful than I thought.  
11 I thank you very much. I look forward to seeing you  
12 Monday morning. If you should settle the case, a simple  
13 phone call to Ms. Gaudet is all that is required.  
14 Otherwise 9:00 on Monday morning. We'll recess.

15 (Ends, 11:15 a.m.)  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,  
do hereby certify that the foregoing record is a true  
and accurate transcription of my stenographic notes  
before Judge William G. Young, on Wednesday, October 15,  
2014, to the best of my skill and ability.

/s/ Richard H. Romanow 10-17-14

\_\_\_\_\_  
RICHARD H. ROMANOW Date